



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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December 16, 1988

Informal Opinion 1988-INF-1216-2

Wendy Patton
Steel Futures Fund Director
Ohio Department of Development

Dear Ms. Patton:

You have asked about the application of the Ohio Ethics Law and related statutes to the members of the Steel Futures Fund Advisory Board. The Ohio Ethics Commission has the authority to interpret the provisions of Chapter 102, and Sections 2921.42 and 2921.43 of the Revised Code, and these statutes will be considered in addressing your question.

The Steel Futures Program was recently created in the Department of Development by H.B. 509 of the 117th General Assembly. The Director of the Department of Development is charged with administering the Program, and is authorized to "consult with appropriate representatives of steel and steel-related industries, appropriate representatives of any union that represents workers in these industries, and other persons with expert knowledge in these industries." See R.C. 122.37(B). One component of the Program is the granting of financial and technical assistance to steel and steel-related industries undertaking projects for certain, specified purposes. See R.C. 122.37(D)-(F).

You have stated in your letter that the Department would like to create an advisory board to discuss guidelines for the Program and to consider and make recommendations on proposals for assistance. The Department would like the Board to be composed of representatives from steel-producing companies, steel-using companies, labor, academia, the community, and the Department itself. People from Ohio, as well as from out of state, would be included on the Board. The Director would invite persons to serve on the Board. Members would be paid an honorarium and travel expenses, and would meet quarterly. There would be no set term for serving on the Board, and members would be reinvited to each meeting.

You have stated that individuals who may be appointed to serve on the Board may also represent an organization which may apply for funding under the Steel Futures Program, or which may have already received funding from the Program.

You state that the duties and responsibilities of the Board will be purely advisory and the Board will offer neither final ruling nor funding approval for specific projects. Members will discuss proposals for assistance, vote, and make recommendations as to which projects should be funded. The Department's staff will take the Board's

recommendations into account in making its own recommendations. The authority to render a final decision to approve or reject funding rests with the Director of the Department of Development, and his approval is necessary to authorize funding for a proposal. In an instance where a project is funded from the Industrial Inducement Account, the release of funds must be approved by the Controlling Board after approval is granted by the Director.

In determining the applicability of the Ohio Ethics Law and related statutes to the members of the Steel Futures Fund Advisory Board, the threshold question is whether the members of the Board are public officials or employees for purposes of Section 2921.42 and Chapter 102. of the Revised Code. These statutory provisions generally restrict a public official or employee from receiving grants and loans from the public agency with which he is connected, or from serving with an organization which receives grants and loans from his public agency. See, e.g., Ohio Ethics Commission Advisory Opinion No. 87-003. These statutes also restrict the ability of a public official to use his position to secure a contract, grant, or other benefit for himself or his private employer, and limit the extent to which he may represent his employer or other party before his own public agency and other public agencies. See, e.g., Advisory Opinions No. 87-003 and 88-008. Chapter 102. is generally applicable to any "public official or employee," which includes any person who is elected or appointed to an office or is an employee of any institution, board, authority, or other instrumentality of the state. See R.C. 102.01(B) and (C). Section 2921.42 is applicable to any "public official," which includes any elected or appointed officer, or employee, or agent of the state. See R.C. 2921.01(A).

In Advisory Opinion No. 85-005, the Ethics Commission held that a member of the Technical Advisory Committee to the Coal Development Office is not a public official or employee for purposes of R.C. Chapter 102. or R.C. 2921.42. The opinion states that in determining that a position is a public office, the "essential requirement" is that the law confers on the position certain duties that involve the exercise of the sovereign power of the state. In explaining what is meant by "sovereign power," the opinion quotes the Ohio Supreme Court case of State ex. rel. Landis v. Butler, 95 Ohio St. 157 (1917), as follows:

If specific statutory independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state. *Id.* at 160.

The opinion also cites Advisory Opinion No. 75-004 which states: "it becomes apparent that 'sovereign power' is a concept meant to imply that the exercise of duty entrusted to one by virtue of statute or some other public authority. These duties . . . involve some discretionary, decision-making qualities." The Ethics Commission found in Advisory Opinion No. 85-005 that the role of the Technical Advisory Committee was merely advisory and did not involve the exercise of the sovereign power of the state, and therefore, members of the Committee were not public officials for purposes of Chapter 102. or R.C. 2921.42.

In this instance, the Steel Futures Fund Advisory Board has not been created by express constitutional or statutory provision, but rather has been established by the Director of the Department of Development in accordance with his authority to consult with experts in the steel and steel-related industries. The Board has no statutory and independent duties with regard to the disposition of public property, the ability to incur financial obligations upon the part of the state, or the performance of other sovereign powers of the state. Although the Board may review and evaluate projects submitted for assistance, and recommend funding decisions to the Department, the Board has no final decision-making authority as to whether a project will be approved for funding. Because the Board's role is advisory and not the exercise of the sovereign power of the state, a member of the Board is not a public official for purposes of Chapter 102. or Section 2921.42. See Advisory Opinion No. 85-005. Furthermore, it is apparent that a member of the Board does not hold an employment relationship with the state. See Advisory Opinions No. 75-022 and 85-005. Therefore, members of the Steel Futures Fund Advisory Board are not public officials or employees who are subject to Chapter 102. or Section 2921.42 of the Revised Code.

As part of this conclusion, it should be noted that members of the Board are not required to file a financial disclosure statement with the Commission. R.C. 102.02(B) empowers the Ethics Commission to "require any class of public officials or employees . . . whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state . . . or the execution of other public trusts," to file annual financial disclosure statements. As discussed above, the duties of the Board are advisory rather than sovereign in nature, and the members of the Board are not public officials or employees. Therefore, members of the Board are not required to file financial disclosure statements with the Ethics Commission.

As noted above, the prohibitions of Chapter 102. and Section 2921.42 apply generally to public officials and employees. However, the remaining statute under the jurisdiction of the Ethics Commission, Section 2921.43, applies generally to "public servants." The term "public servant" is defined for purposes of R.C. 2921.43 in R.C. 2921.01(B) to include any public official and "any person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." In this instance, the members of the Board are acting as advisors or consultants to the Director of the Department of Development with regard to the expenditure of public funds and the development of guidelines for the Steel Futures Program. Therefore, members of the Board are public servants under R.C. 2921.43. Division (A) of Section 2921.43 prohibits a public servant from soliciting or accepting any compensation, other than as allowed by law, for performing his official duties or as a supplement to his public compensation. Division (B) prohibits a public servant from soliciting or accepting anything of value in consideration of appointing any person to a public office or employment or affecting the status of any public employee with respect to any material aspect of his employment.

Although it has been concluded that members of the Steel Futures Advisory Board are not subject to Chapter 102. or Section 2921.42, the cautionary language of the Ethics Commission in Advisory Opinion No. 85-005 with regard to the members of the Technical Advisory Committee to the Coal Development Office of the Department of Development is equally applicable in this instance and bears repeating:

It should be noted that the Committee, as well as a number of other boards and commissions created by the General Assembly in recent years, is required to have representation of certain business, labor, governmental, educational, and environmental interests that can provide necessary support, expertise, or resources to the Department. Many times, these individuals represent institutions that are likely to seek participation in the same programs on which their representatives advise the government. This may create an inherent conflict of interest, particularly when the board or commission is required to recommend the expenditure of public funds in the form of loans or grants. It would create the appearance of impropriety for a Committee member to participate in formal or informal discussions or vote on any proposal in which he or his institution has an interest. In addition, it may appear to the general public or to unsuccessful applicants competing for funds that Committee members or their institutions receiving funding from the Coal Development Office or the Department of Development had an unfair advantage in the process.

Therefore, members of the Steel Futures Fund Advisory Board should abstain from participating in matters which would benefit their own interests or the interests of the organizations with which they serve.

This informal staff advisory opinion was approved by the Ethics Commission at its meeting on December 16, 1988, based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. This informal opinion is based on an interpretation of the Ethics Law and related statutes and does not purport to interpret other laws or rules. If you have any questions, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

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